

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY ALLEN HARRIS,

Defendant-Appellant.

UNPUBLISHED

May 22, 2014

No. 296631

Oakland Circuit Court

LC No. 2009-225570-FC

ON SECOND REMAND

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

This case returns to this Court on second remand from the Michigan Supreme Court, which has directed this Court to determine whether defendant, Johnny Allen Harris, was prejudiced by (1) the improper admission under the plain error test in *People v Carines*,¹ or (2) counsel's ineffective assistance. We conclude that Harris has demonstrated that the improper admission of evidence prejudiced him under both circumstances. Accordingly, we vacate his convictions of three counts of first-degree criminal sexual conduct² and remand for a new trial.

I. FACTS

A. BACKGROUND FACTS

This Court has set forth the background facts of this case in two previous opinions. In pertinent part, those facts are as follows:

At trial, JCR testified that she is six years old. She has five siblings, including a sister named AR. JCR stated that she knew Harris because he used to live in her house. She shared a bedroom with her sister, AR, but each of them had

¹ *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

² MCL 750.520b(1)(a).

their own beds. JCR testified that on six occasions, when she was five and six years old, Harris woke her up and took her from her bedroom to various parts of the house and told her to suck his penis, and she used her mouth and hands. Yellow stuff went into her mouth, which she would spit into a sink. She would then get a drink of water and return to bed. Harris told JCR that she would get in trouble if she told anyone. JCR did not tell her mother until Harris moved out of the house.

After Harris moved out, JCR told her sister AR what happened by whispering in her ear that Harris told her to “suck his penis.” Eventually, one of JCR’s other siblings, who had heard what happened, told their mother about the incident. Her mother questioned JCR alone and had her demonstrate on a banana what she had to do. Her mother had JCR leave the room and then called her back to have her explain it again to see if she explained it the same way, which she did. JCR’s [sic] mother called the police, and they went to the police department. JCR’s [sic] mother then took JCR to a pediatrician to be examined. She also took JCR to Care House, where Sarah Killips interviewed her.

JCR’s sister, AR, testified that Harris would come into her and JCR’s bedroom at night. Harris would ask the girls if they were awake, and he would ask JCR if she wanted some water. JCR would say yes, and they would go downstairs. AR stated that Harris never asked anyone else if they wanted any water. She thought it was odd that Harris would ask JCR if she wanted any water because normally Harris would not let them get up to get water. She remembered that JCR would be gone 10 to 20 minutes and that she would have a bottle of water when she returned. AR also stated that normally Harris would not let them drink bottled water. AR testified that JCR would be kind of scared or frightened when she would return. AR stated that she was glad when Harris moved out because he would push her and he “did not treat [them] well.”

* * *

Harris testified that he moved out of the home while JCR’s [sic] mother was out of town because she was “very confrontational.” He stated that, on one occasion, he and JCR’s [sic] mother got into an argument in which she threatened to call the police on him, stating, “I’ll call the police on your ass. You know they’ll believe me if I call them.” He also stated that, after he had moved out of the house, JCR’s [sic] mother called him to ask why he had moved out. He responded by saying their marriage was over, to which she replied, “I’m gonna get your ass.” Harris testified that he never molested JCR, and he never put his penis in her mouth. He stated that he believed JCR’s mother had “put her up to

this.” Harris denied that he did not like to give the children bottled water. He also denied ever pushing AR while he was moving out.^[3]

On direct examination, pediatrician Carrie Ricci testified about examining and assessing the complainant:

Dr. Ricci testified that she asked JCR direct questions “for the purpose of providing her with the treatment and seeing what, if anything—the diagnosis [was].” JCR told her that Harris “had woken her up from sleep, taken her downstairs, and had her suck on his penis until yellow stuff came out.” Dr. Ricci gave JCR a physical examination. She also tested JCR for sexually transmitted diseases, which tests all came back negative. Dr. Ricci diagnosed JCR with child sexual abuse and nocturnal enuresis (bedwetting). Dr. Ricci made her diagnosis because she believed that JCR had been abused.^[4]

During this testimony, Dr. Ricci began to cry.

After Dr. Ricci’s testimony on direct examination, the trial court excused the jury to address an objection by defense counsel. Defense counsel noted that the witness was crying and opined that it was improper and prejudicial. Defense counsel requested that the trial court not allow Dr. Ricci to testify until she was composed. The judge stated that Dr. Ricci became “choked up” and had “a couple of tears.” The judge asked Dr. Ricci to “[t]ry not to do that,” and Dr. Ricci responded affirmatively.

The prosecutor then elicited improper testimony from Dr. Ricci on redirect examination:

On cross-examination, Dr. Ricci testified that she saw no evidence of sexual abuse in JCR. She also admitted that “the majority of the history was obtained from Mom.” However, on redirect examination, the prosecution elicited from Dr. Ricci the improper testimony regarding her diagnosis:

Q. . . . What was your—did you make a finding or a diagnosis?

A. My diagnoses were, number one, child sexual abuse; number two, enuresis.^[5]

There is no indication in the record that Dr. Ricci was crying when she made these statements.

³ *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2011 (Docket No. 296631) (*Harris I*), rev’d in part 491 Mich 906 (2012) (*Harris II*).

⁴ *Id.*

⁵ *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2012 (Docket No. 296631) (*Harris III*), vacated 493 Mich 066 (2012) (*Harris IV*).

Defense counsel recross-examined Dr. Ricci about the basis of her diagnosis:

Q. How did you diagnose child abuse, please?

A. Based on the history from [JCR] and her mother.

Q. There were no objective—no objective evidence; no objective findings, wouldn't you agree?

A. That is common in cases of abuse if there's normal physical examination.

Q. But if you—if I came into you and I said that I had the flu with no symptoms and nothing—no evidence of it, would you say, as a diagnosis, I had the flu?

A. No.

Q. Then how can you say, with a child who has no symptoms—I mean, nothing. No find no—no corroborating physical finding in this matter; is that true?

A. No physical findings.

Q. Only on the history you make a diagnosis, if I understand, of child abuse based upon what you said?

A. Correct.

Q. And primarily, the biggest part of your history came from that Mom?

A. Um, the large portion—I'm note—is from Mom, and—but [JCR] is the one who told me, as I stated earlier, what [JCR] had told me, and that was enough for me to diagnose her as sexual abuse.

Q. What were the—it was only her statement that allowed you to make the diagnoses; is that my understanding?

A. Yes.

Q. Without any other physical manifestations?

A. Correct.^[6]

⁶ *Id.*

Defense counsel also addressed that Dr. Ricci had cried on the stand while testifying:

Q. Let me ask you something. When you took the witness stand, you began to cry.

A. Um-hum.

Q. Is it that you felt sympathy because of the story that made you write that diagnoses [sic]?

A. No, I did not write the diagnosis because I felt sympathy; I wrote the diagnosis because I believe that [JCR] was abused.

Q. You believe—

A. Yes.

Q. What did you rely on, other than your belief?

A. I relied on the testimony from [JCR] and her mother.

Q. And based upon what they told you, with no physical evidence, you write that she had been abused?

A. Correct.

The parties' closing arguments recognized that the case hinged on the complainant's credibility:

In closing argument, the prosecution framed the issue as a credibility contest between JCR and Harris: "[W]hat it comes down to is do you believe [JCR] beyond a reasonable doubt or don't you? . . . You have her saying it happened and you have the defendant saying it didn't happen. Who do you believe?" The prosecution argued that JCR's statement to Dr. Ricci about the sexual conduct with Harris was consistent with her other statements. The prosecution did not mention Dr. Ricci's diagnosis of child abuse. Defense counsel's closing argument addressed Dr. Ricci's testimony by emphasizing that her testimony showed a "lack of proof." Defense counsel also stressed the fact that Dr. Ricci's opinion was based on a history that was given to her by JCR's mother, not on any physical evidence.^{17]}

⁷ *Id.*

B. PROCEDURAL HISTORY

After his conviction, Harris raised several issues on appeal.⁸ In pertinent part, we determined that Dr. Ricci's testimony did not constitute plain error, and we affirmed Harris's convictions and sentences.⁹

Harris appealed this Court's determination to the Michigan Supreme Court, which reversed this Court's decision in part.¹⁰ The Michigan Supreme Court concluded that Dr. Ricci's testimony that the complainant was the victim of sexual abuse was plain error, and that counsel was ineffective for failing to challenge the testimony.¹¹ The Michigan Supreme Court remanded for this court to "determine whether [Harris] was prejudiced by the admission of the doctor's diagnosis and whether [Harris] is entitled to a new trial."¹²

On remand, this Court determined that we must assess whether "a real likelihood existed that Dr. Ricci's sexual abuse diagnoses affected the outcome of the trial."¹³ We concluded that the improper admission of Dr. Ricci's redirect examination testimony that the complainant was a victim of child sexual abuse did not require reversal.¹⁴ We reasoned that the parties had not emphasized Dr. Ricci's improper testimony in their closing arguments.¹⁵

We also stated that, to prove prejudice under an ineffective assistance of counsel standard, "a defendant must show that the result of the proceeding would have been different but for defense counsel's error."¹⁶ We concluded that "the properly admitted evidence at trial would allow a rational jury to find Harris guilty beyond a reasonable doubt."¹⁷ We reasoned that, in light of the complainant's detailed testimony, her consistent story, and the supporting testimony of complainant's sister, "the admission of the improper evidence did not affect the outcome of the trial."¹⁸ On these bases, we determined that Harris was not entitled to a new trial.¹⁹

⁸ *Harris I*, unpub op at 2, 4-9.

⁹ *Id.*, unpub op at 10.

¹⁰ *Harris III*, unpub op at 5.

¹¹ *Harris II*, 491 Mich at 906.

¹² *Id.*

¹³ *Harris III*, unpub op at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*, unpub op at 7.

¹⁸ *Id.*

¹⁹ *Id.*

Harris again appealed to the Michigan Supreme Court, which concluded that this Court erred by focusing on the complainant's testimony.²⁰ The Michigan Supreme Court then instructed this Court to determine "whether the defendant was prejudiced by the admission of [Dr. Ricci's] diagnosis under both the plain error test . . . and the ineffective assistance of counsel standard."²¹

II. PREJUDICIAL EFFECT UNDER A PLAIN ERROR ANALYSIS

A. STANDARD OF REVIEW

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal.²² It is undisputed that Harris did not raise his due process challenge to Dr. Ricci's testimony on redirect examination before the trial court.

In criminal cases, we review unpreserved issues for plain error affecting a party's substantial rights.²³ An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.²⁴

B. LEGAL STANDARDS

The defendant has the burden to show that a plain error was prejudicial.²⁵ "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice."²⁶ Actual prejudice exists when the error was outcome determinative.²⁷ An error is outcome determinative "if it undermined the reliability of the verdict."²⁸ To determine whether the defendant is prejudiced, this Court must review "the entire record, including both the jury instructions and the evidence."²⁹

²⁰ *Harris IV*, 493 Mich at 906, quoting *Harris III*, unpub op at 7.

²¹ *Harris IV*, 493 Mich at 906.

²² *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

²³ *Carines*, 460 Mich at 763.

²⁴ *Id.*

²⁵ *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

²⁶ *Pipes*, 475 Mich at 274.

²⁷ *Id.* at 279.

²⁸ *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

²⁹ *Carines*, 460 Mich at 772 n 18.

C. PREJUDICIAL EFFECT FROM DR. RICCI'S TESTIMONY

We conclude that Dr. Ricci's impermissible testimony that the complainant was the victim of sexual abuse was outcome determinative under the plain error standard of *Carines*.³⁰

This case was, in essence, a credibility contest between the complainant and the defendant. In such cases, the danger of an expert opining about whether sexual abuse occurred is that, "[t]o a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat."³¹ A juror evaluating a close question is not likely to have "overlooked the significance of [the] diagnosis, which constituted the tiebreaking, neutral expert opinion of the only doctor who had personal knowledge" of a disputed fact.³² Thus, allowing an expert witness to opine on whether sexual abuse in fact occurred undermines the reliability of a verdict because it allows the jury to unfairly substitute the expert's opinion of the witness's credibility for the jury's own opinion of the witness's credibility, particularly in close cases in which the jury's determination rests solely on credibility determinations.

Here, Dr. Ricci's based her impermissible expert opinion on whether sexual abuse occurred solely on the complainant's history and statements. Thus, Dr. Ricci's opinion that sexual abuse did in fact occur was, under the case law, essentially an assessment of the complainant's credibility.³³ Even though there is strong evidence supporting the complainant's credibility, Dr. Ricci's testimony created the danger that the jury credited Dr. Ricci's neutral expert opinion of the complainant's credibility as conclusive, rather than making its own determination of the complainant's credibility. Given the nature of the error, even in light of the other evidence and jury instructions, we conclude that Dr. Ricci's testimony undermined the reliability of the verdict in this case. Thus, Harris has shown that the improper admission of this testimony actually prejudiced him.

Even if the defendant shows actual prejudice, "reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"³⁴ Here, reversal is warranted because this error affected the fairness of Harris's proceedings. The Michigan Supreme Court has strongly condemned this type of inadmissible testimony because it leads to an unreliable determination of a defendant's guilt or innocence.³⁵ Because Dr. Ricci's

³⁰ *Id.* at 763.

³¹ *People v Beckley*, 434 Mich 691, 722; 456 NW2d 391 (1990) (Opinion by BRICKLEY, J.).

³² *People v Fackelman*, 489 Mich 515, 538; 802 NW2d 552 (2011).

³³ See *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986)

³⁴ *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

³⁵ See *Smith*, 425 Mich at 109; *Beckley*, 434 Mich at 737.

testimony rendered Harris's trial unreliable, it also rendered his proceedings fundamentally unfair. We conclude that a new trial is warranted.

D. PREJUDICIAL EFFECT FROM DR. HARRIS'S EMOTIONAL RESPONSE

We briefly address the fact that Dr. Ricci cried during her direct testimony. In *People v Fackleman*, the Michigan Supreme Court determined that an error was prejudicial when the error-- the defendant's inability to confront a witness who testified that the defendant was not psychotic-- and other evidentiary errors "compounded the prejudice caused by the violation of [the defendant's] right of confrontation."³⁶

Here, Harris has not shown that Dr. Ricci's emotional response while testifying was in any way improper. A witness's unsolicited emotional outburst is only grounds for a new trial if the outburst was unfair and prejudicial, and the trial court cannot cure the outburst's prejudicial effect.³⁷ Here, the trial court complied with defense counsel's request to wait until Dr. Ricci was composed to continue questioning, and instructed the jury at the end of trial that sympathy was not to factor into its decision.

Further, we emphasize that Dr. Ricci was *not* crying on redirect examination when she testified that she diagnosed the complainant as sexually abused. Dr. Ricci cried during direct examination, when recounting what the complainant told her about the abuse. Thus, we conclude that Dr. Ricci's emotional response, when testifying on direct examination regarding what the complainant told her occurred, did not compound the error that later occurred on redirect examination, when Dr. Ricci opined that the complainant had been abused. Dr. Ricci's later opinion testimony alone was sufficient to actually prejudice Harris.

E. CONCLUSION REGARDING ACTUAL PREJUDICE

In sum, the case hinged on the complainant's credibility. Dr. Ricci's testimony on redirect that she diagnosed the complainant as sexually abused was actually prejudicial. It created the danger that the jury found Harris guilty because it relied on Dr. Ricci's opinion of the complainant's credibility, rather than making its own determination

Considering the record evidence and the jury instructions, we conclude that Harris has shown that plain error prejudiced him by undermining the reliability of the proceedings.

³⁶ *Fackleman*, 489 Mich at 539.

³⁷ See *People v Gonzales*, 193 Mich App 263, 265-266; 483 NW2d 458 (1992); *People v Bauder*, 269 Mich App 174, 194-195; 712 NW2d 506 (2005).

III. PREJUDICIAL EFFECT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.³⁸ When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.³⁹

B. LEGAL STANDARDS

A defendant was prejudiced by counsel's ineffective assistance if there is a reasonable probability that, but for defense counsel's errors, the "factfinder would have had a reasonable doubt respecting guilt."⁴⁰

"A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different."⁴¹ This Court must also consider "whether the result of the proceeding was fundamentally unfair or unreliable[.]"⁴²

C. APPLYING THE STANDARDS

We conclude that Harris has demonstrated that counsel's ineffective assistance in not challenging Dr. Ricci's opinion testimony prejudiced Harris.

The standard for prejudice regarding ineffective assistance of counsel is lower than the actual prejudice standard under which we assess plain error.⁴³ We thus conclude that, there is a reasonable probability that, but for defense counsel's errors, the factfinder would have had a reasonable doubt concerning Harris's guilt. As discussed above, Dr. Ricci's testimony improperly bolstered the complainant's credibility and led to an unreliable verdict. Even had we not already concluded that this error made Harris's proceedings fundamentally unfair, we would conclude that the error made Harris's proceedings unreliable as a method for determining Harris's guilt.

³⁸ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³⁹ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

⁴⁰ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994), quoting *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁴¹ *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). See *Strickland*, 466 US at 694.

⁴² *Pickens*, 446 Mich at 312 n 16, quoting *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993).

⁴³ *Fackleman*, 489 Mich at 537 n 12.

IV. CONCLUSION

We conclude that Harris has demonstrated that he was actually prejudiced by Dr. Ricci's improper opinion on redirect examination regarding whether the complainant was sexually abused. We also conclude that Harris has demonstrated that it is reasonably probable that, but for counsel's error in allowing that opinion to be admitted, the jury would have entertained a reasonable doubt concerning his guilt. Therefore, Harris is entitled to a new trial.

We vacate Harris's convictions and sentence, and remand for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood